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April 1, 2002

The Honorable Michael Powell  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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Dear Chairman Powell:

We are concerned by widespread confusion, particularly in press reports, over the meaning and implications of the D.C. Circuit's recent decision in *Fox Television Stations, Inc. v. FCC*. The court's decision addressed two issues: (1) the appropriate level of judicial involvement in the Commission's biennial review of its rules; and (2) the validity of the Commission's decision to retain the 35% national television ownership cap and the cable/television broadcast cross-ownership rule. As to the first issue, the court's opinion is, as the Commission has recognized, a disaster for the Commission. Absent a successful appeal, Congress needs to step in to fix the situation. As to the second issue, the court vacated the cable/broadcast cross-ownership rule but left in place the 35% national broadcast ownership cap pending further consideration by the Commission. In remanding the 35% cap, the court found that: (a) the national broadcast ownership limit is both constitutional and reasonable; (b) diversity and localism are sufficient public interest justifications for the cap; and (c) it is entirely possible that the Commission will be able to justify a decision to retain the cap. Indeed, the court's *reason* for leaving the 35% cap in place was its conclusion that "the probability that the Commission will be able to justify retaining the [35% cap] is sufficiently high" that vacating the cap was "not appropriate."

Press reports have overlooked these important aspects of the court's opinion and jumped to the conclusion that the ruling must inevitably lead to repeal of the 35% cap and an unprecedented wave of media industry mergers and consolidation. In fact, the D.C. Circuit's decision leaves ample room for the Commission to uphold the cap. The court did not find the 35% cap to be invalid, arbitrary, or capricious. Rather, it found that the FCC in its biennial review report failed adequately to develop and explain the underpinnings of the limit. The court's decision invalidated the FCC's review of the rule, *not* the rule itself. You have said that the national broadcast ownership cap issue is worthy of a searching inquiry, and that is precisely what is called for by the court's decision.

#### THE CAP IS BOTH CONSTITUTIONAL AND REASONABLE

The court expressly held that the cap is constitutional, rejecting outright the networks' First Amendment arguments. The court found that "Congress could reasonably determine that a more diversified ownership of television stations would likely lead to the presentation of more diverse points of view. By limiting the number of stations each network (or other entity) may own, the [cap] ensures that there are more owners than there would otherwise be." In the court's words, "it is not unreasonable – and therefore not unconstitutional – for the Congress to prefer

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having in the aggregate more voices heard, each in roughly one-third of the nation, even if the number of voices heard in any given market remains the same.”

#### **THE CAP MAY BE RETAINED TO PROMOTE DIVERSITY AND LOCALISM**

The court flatly rejected the networks’ argument that the cap can be justified only by competitive considerations. Instead, the court held that “in the context of regulation of broadcasting, ‘the public interest’ has historically embraced diversity (as well as localism), and nothing in § 202(h) signals a departure from that historic scope.” The court thus agreed with the Commission “that protecting diversity is a permissible policy” and that the Commission may justify retention of the cap on the ground that it furthers diversity or localism. The court found that the relevance of diversity and localism distinguishes the 35% cap from the 30% cable ownership cap at issue in *Time Warner II*, and rendered the networks’ reliance on *Time Warner II* “less than convincing.”

#### **THE COURT’S DECISION LEAVES AMPLE ROOM FOR THE COMMISSION TO RETAIN THE CAP**

The court expressed its confidence that the Commission could, after looking afresh at the cap and further developing its analysis, justify the 35% cap. The court emphasized:

[T]he Commission put forward justifications for retaining the [35% cap] – furthering local diversity by strengthening the bargaining position of network affiliates and furthering national diversity – that we rejected principally because the Commission failed to address the contrary position it took in its 1984 Report. We noted, however, that the Commission’s failure to explain why it departed from the views it expressed in 1984 appears to have stemmed from an error of law and not necessarily from an inability to do so.

It noted that, although the Commission would need to explain its reasons for reaching conclusions that differ from those of the 1984 Report, “that is by no means inconceivable; the Report is, after all, now almost 20 years old.” The court chose not to vacate the rule because it determined that “the probability that the Commission will be able to justify retaining [it] is sufficiently high that vacatur of the Rule is not appropriate.” The court thus opened the way for the Commission on remand to explain its reasoning and advance justifications for retaining the national broadcast ownership limit.

#### **THERE ARE COMPELLING REASONS TO RETAIN THE CAP**

The court recognized that there may be valid justifications for retaining the cap. The court noted that the cap may “strengthen the bargaining power of network affiliates and thereby promote diversity of programming,” and it expressly rejected the networks’ contention that “this reason is unresponsive to § 202(h).” Moreover, the court agreed with intervenors NASA and NAB that the effects of the rule on national advertising and program production markets might provide compelling justifications for the rule and directed the Commission “either to develop or

to jettison [these reasons] on remand.” Of course, in its examination of the rule, the Commission is not limited by the existing record. The Commission may in the course of its review uncover additional justifications for the cap. While the Commission is not limited by the justifications advanced by the D.C. Circuit, the court’s analysis affirms that there are reasonable objectives to justify the national broadcast ownership limit.

#### **THE COURT HAS CONFIRMED THE FCC’S COURSE**

Even before the court issued its decision, you expressed the view that the cap was worthy of a searching inquiry by the Commission. The court’s decision to remand the national broadcast ownership limit to the Commission obligates the Commission to do exactly that – to take a serious and thorough look at the cap in light of the Commission’s obligation to promote *three* goals: diversity, localism, and competition. Eliminating the ownership cap without a thorough evaluation, as some press reports assume the Commission will do, would be a violation not only of the court’s directive, but also of the Commission’s statutory obligation under section 202(h) to examine its rules and make a reasoned determination about whether they are in the public interest. The Commission can and should focus on the need to preserve diversity and localism, as well as on competitive concerns. The Commission can and should construct a solid record on which to base its evaluation of the cap. It can and should provide persuasive reasons for why retaining the rule is in the public interest and furthers the goals of diversity, localism, and competition.

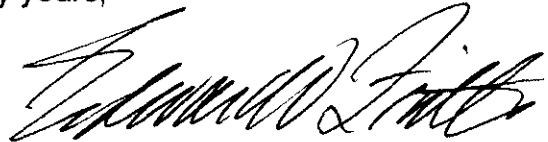
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While the court has provided the Commission with a useful roadmap with respect to the cap, at the same time, its holding that the Commission must justify the retention of myriad rules by a full rulemaking and a showing that each is “necessary” every two years is extremely troublesome and threatens administrative paralysis. NASA and NAB would welcome opportunities to support the Commission’s efforts, in court or in Congress, to undo the pernicious effects of the court’s determination in this regard.

Sincerely yours,



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